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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]1921

No. [redacted]214

JULIUS I. SMIETANKA, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

vs.

INDIANA STEEL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED JANUARY [redacted], 1921.

(28067)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 710.

JULIUS I. SMIETANKA, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

vs.

INDIANA STEEL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 In the United States Circuit Court of Appeals for the Seventh Circuit.

October Term, 1920, January Session, 1921.

JULIUS F. SMIETANKA, COLLECTOR OF INTERNAL REVENUE for the first district of Illinois, plaintiff in error,
vs.
INDIANA STEEL COMPANY, A CORPORATION, DEFENDANT in error.
No. 2844.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

To the honorable the Supreme Court of the United States:

The above entitled cause has been fully heard and argued in this court before the below subscribing judges thereof, and certain questions of law in said cause, as below indicated, have arisen, whereon this court is in doubt, and for its proper decision of such questions this court desires the advice and instruction of the honorable Supreme Court of the United States.

It is therefore ordered that the statement and questions below following be certified to the Supreme Court of the United States in pursuance of the Act of Congress in such case made and provided.

STATEMENT.

The suit was commenced in the United States District Court against plaintiff in error. Declaration in the suit was filed, alleging that defendant in error is a corporation and that pursuant to the supposed authority of section 38, chapter 6, of an act of Con-
2 gress of August 5, 1909, entitled "An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," there was assessed against defendant in error, as a corporation having capital stock and alleged to be engaged in or doing business, certain internal revenue special excise taxes, alleged to be due the United States, of $25,897.27 for the year 1910, and of $52,166.26 for the year 1912; that the lists for such assessment were duly sent to S. M. Fitch, as the then collector of internal revenue for the United States for the First District of Illinois, wherein it was claimed that such taxes were assessable and payable, and that the said S. M. Fitch, as such collector of internal revenue, did in each case make due demand upon defendant in error for payment of such tax, giving in each case due notice that in default of payment the penalties as provided by law for non-payment would be exacted and collected from defendant in error; and that thereupon in each case, after due protest against such assessments and returns of taxes, defendant in error unwillingly and under duress paid to said S. M. Fitch, and said S. M. Fitch collected and received, as such collector of internal revenue, the amounts of said taxes, respectively; that in and for the years for which such taxes were assessed

and paid defendant in error was not engaged in, nor carrying on, nor doing business of any character, having in the year 1909 leased all its property to the Illinois Steel Company, and that therefore such taxes were unlawfully assessed against and collected from defendant in error, and that in each case defendant in error made due claim for refund of such taxes in manner as is by law required, but that in each case its claim therefor was rejected.

The declaration further alleges that plaintiff in error is the successor in office of the said S. M. Fitch as such collector of internal revenue, and it is not charged in the declaration that plaintiff in error in his capacity of collector of internal revenue, or in any other capacity, participated in the assessment or collection of such taxes, or that all or any part thereof ever came into his possession or control.

The judgment, to reverse which the writ of error herein is prosecuted, was for $105,894.01, and in, or as part of such judgment, the court certified there was probable cause for the act done by the collector in the collection of such amounts from defendant in error, and that in making the collections he acted under the direc-
3 tion of the Commissioner of Internal Revenue, and that the amounts recovered shall be provided for and paid out of the proper appropriation from the Treasury of the United States.

QUESTIONS.

1. Assuming that the declaration states a good cause of action had the suit been brought against S. M. Fitch, the internal revenue collector who actually collected and received the taxes, does it state any cause of action whatever against said S. M. Fitch's successor in office, the plaintiff in error, against whom the suit was brought, but who had no participation in the collection, receipt or disbursement of such taxes?

2. May suit in the District Court of the United States properly be brought and maintained against a United States collector of internal revenue for the recovery of the amount of a United States internal revenue tax, unlawfully assessed and collected, but in the collection and disbursement of which such collector had no agency, the entire transaction of such assessment, collection and disbursement having occurred during the incumbency of such office of a predecessor in office of such collector?

FRANCIS E. BAKER,
United States Circuit Judge.
SAMUEL ALSCHULER,
United States Circuit Judge.
EVAN A. EVANS,
United States Circuit Judge.
Judges of the United States Circuit Court of Appeals for the Seventh Judicial Circuit.

(Endorsed:) Filed Jan. 25, 1921. Edward M. Holloway, clerk.

4 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 3, inclusive, contain a true copy of the questions certified to the Supreme Court of the United States on the twenty-fifth day of January, 1921, in the case of Julius F. Smietanka, collector of internal revenue for the first district of Illinois, plaintiff in error, vs. Indiana Steel Company, a corporation, defendant in error, No. 2844, October term, 1920, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this twenty-fifth day of January, A. D. 1920.

[SEAL.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit
Court of Appeals for the Seventh Circuit.

(Endorsed:) Received Jan. 27, 1921. Office of the clerk Supreme Court U. S.

(Indorsement on cover:) File No. 28067. U. S. Circuit Court Court Appeals, 7th Circuit. Term No. 710. Julius F. Smietanka, collector of internal revenue for the first district of Illinois, vs. Indiana Steel Company (certificate.) Filed January 29th, 1921. File No. 28067.

○

No. [redacted]214

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JULIUS I. SMETANKA, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

v.

INDIANA STEEL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO ADVANCE.

(Argument, Government Printing Office, 1921)

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JULIUS I. SMIETANKA, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

v.

INDIANA STEEL COMPANY.

No. 710.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this case and set it for hearing on October 10 next.

The Circuit Court of Appeals has certified to this court the question as to whether a suit to recover internal-revenue taxes paid under protest may be maintained against an internal-revenue collector when the taxes in question were paid to his predecessor in office. It is a question of importance both to the Government and to the general public, because any uncertainty that may exist as to the rights of taxpayers in commencing such suits should, in the interest of the orderly administration of the law, be speedily removed.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

MAY, 1921.

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No. 214.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

JULIUS P. SMITH AND A. COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF LOUISIANA, PLAINTIFFS IN ERROR,

vs.

INDIANA MINING COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF ON BEHALF OF THE COLLECTOR OF INTERNAL REVENUE.

JUDD & DETWEILER, PRINTERS, WASH., D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1921.

JULIUS F. SMIETANKA, COLLECTOR OF Internal Revenue,
v.
INDIANA STEEL COMPANY, A CORPORATION. } No. 214.

BRIEF FOR THE COLLECTOR OF INTERNAL REVENUE.

STATEMENT OF FACTS.

The Indiana Steel Company is a corporation duly organized and existing under the laws of Indiana. A corporation excise tax was assessed against said company for the year 1910 in the sum of $25,897.27 under the provisions of section 38 of the act of August 5, 1909, and was paid under protest by the company on the 30th day of June, 1911. A claim for refund was filed on June 10, 1913, and was rejected by the Commissioner of Internal Revenue on the 19th of November, 1913. The tax assessed for such year had been demanded by S. M. Fitch, collector of internal revenue for the first district of Illinois, and had been paid to said Fitch.

A further tax was assessed under section 38 of the act of August 5, 1909, for the year 1912 in the sum of $52,166.26, which was paid under protest on the 30th day of June, 1913. On November 13, 1913, the company filed a claim for refund for this amount, which was rejected by the Commissioner of Internal Revenue on the 19th day of November, 1913. The tax assessed for the year 1912 had been demanded by S. M. Fitch, collector of internal revenue for the first district of Illinois, and had been paid to said Fitch.

On October 6, 1915, an action was brought against Julius F. Smietanka, collector of internal revenue for the first district of Illinois, to recover the amounts paid under protest for the years 1910 and 1912, on the theory that the plaintiff company was not carrying on or doing business during the years for which the tax was assessed and was, therefore, not liable to taxation under section 38 of the act of August 5, 1909.

On November 6, 1916, a plea of general issue was filed. Thereafter, on July 9, 1919, a motion of the defendant to withdraw his plea and file a demurrer was denied by the court. On December 5, 1919, a jury was waived and the cause submitted to the court upon a stipulation waiving a jury and agreed statement of facts.

Judgment was entered on December 18, 1919, in favor of the plaintiff in the District Court for $105,-894.01, representing the sum of $25,897.27, with interest from June 30, 1911, as taxes paid under protest on that date for the year 1910, and the sum

of $52,166.26, with interest from June 30, 1913, as taxes paid under protest for the year 1912.

Defendant below sued out a writ of error in the United States Circuit Court of Appeals for the Seventh Circuit, where the case has been heard and argued, and decision reserved. Certain questions of law arising in the consideration of this case upon which the said Circuit Court of Appeals is in doubt have been certified by the judges of said court for advice and instruction from the Supreme Court of the United States.

The questions certified are:

1. Assuming that the declaration states a good cause of action had the suit been brought against S. M. Fitch, the internal-revenue collector who actually collected and received the taxes, does it state any cause of action whatever against said S. M. Fitch's successor in office, the plaintiff in error, against whom the suit was brought, but who had no participation in the collection, receipt, or disbursement of such taxes?

2. May suit in the District Court of the United States properly be brought and maintained against a United States collector of internal revenue for the recovery of the amount of a United States internal revenue tax, unlawfully assessed and collected, but in the collection and disbursement of which such collector had no agency, the entire transaction of such assessment, collection, and disbursement having occurred during the incumbency of such office of a predecessor in office of such collector?

These questions may be reduced to one: Will an action lie against a collector of internal revenue for the recovery of taxes alleged to have been illegally assessed and collected by a former collector?

ARGUMENT.

The action against a collector of internal revenue to recover back taxes is a personal action, and therefore such an action can not be maintained against a collector in office for the recovery of money exacted by and paid to his predecessor in office.

The protested payments were exacted by and made to S. M. Fitch, collector of internal revenue, while the action to recover back such taxes is brought against Julius F. Smietanka, who succeeded Fitch in office. The action, therefore, is brought against a present collector for the recovery of money had and received by his predecessor in office, and will not lie.

The action against the collector to recover back taxes paid under protest is a personal action (*Sage* v. *U. S.*, 250 U. S. 33, 37), and will not lie against his successor in office (*Roberts* v. *Lowe*, 236 Fed. 604, 605; *Phila. H. & P. R. Co.* v. *Lederer, Collector*, 242 Fed. 492).

No provision of the revenue laws of the United States specifically authorizes or may be construed to authorize the maintenance of a suit against a collector in his official capacity for the recovery of taxes, and it is well settled that the United States can not be sued in any court without its consent. (*Carr* v. *U. S.*, 98 U. S. 433; *Kansas* v. *U. S.*, 204 U. S. 331.) There-

fore, the action against the collector to recover taxes is a personal action and not one against the collector in his official capacity.

Not even after judgment is entered does the United States become a party unless a certificate of probable cause is issued in accordance with section 989 of the Revised Statutes. (*U. S.* v. *Sherman*, 98 U. S. 565, where it was held that there must be a certificate of probable cause before the liability of the Government to pay a judgment against a revenue officer can attach.)

Section 989 Revised Statutes provides:

> SEC. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

In *Roberts* v. *Lowe* (236 Fed. 604), the court said (p. 605):

> Section 989 of the Revised Statutes providing that when recovery is had against a collector for the money exacted by him, and by

> him paid into the Treasury, no execution shall issue against such collector, provided the court certifies there was probable cause for the act, only in terms is in aid of the collector who received and turned over the tax to the Treasury Department * * * If recovery were had against the present collector, for reasons stated in the earlier part of this opinion, I do not see that any legal machinery exists by which he could obtain restitution from the Government.

Nor will a certificate of probable cause issue to protect a collector when a judgment is entered against him for the recovery of taxes collected by his predecessor. Section 989 of the Revised Statutes of the United States provides that in cases where a recovery is had in a proceeding against a collector or other officer "for any act done *by him*, or for the recovery of any money exacted by or paid *to him*, and *by him* paid into the Treasury in the performance of *his* official duty," the court may issue a certificate of probable cause, and no execution shall issue "against such collector," and the amount recovered shall, upon final judgment, be paid out of the Treasury of the United States.

The United States, however, will not refund taxes sued for unless a judgment is recovered against the collector who collected the taxes. This is evident from section 3220 of the Revised Statutes, which specifies that the Commissioner of Internal Revenue may repay to any collector the amount of money recovered against *him* for taxes "collected by him

* * * in any suit brought against him by reason of anything *done* in *the due performance of his official duty.*''

Section 3220, Revised Statutes, as far as the same is material to this issue, reads:

> SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized * * * to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the costs and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty.

As was said by the Circuit Court of Appeals of the Third Circuit in *Philadelphia H. & P. R. R. Co.* v. *Lederer* (242 Fed. 492):

> We concede the force of the company's argument, that in substance, and especially in *practical effect, suits such as this are against the collector as an official rather than as an individual*—his personal liability is rarely if ever enforced—and it may be that Congress might with safety and propriety extend the existing law to cover the situation now presented. But until the change be actually made, we are bound by the law as it stands, and we see no reason to doubt that the

> statutes and decisions now in force prevent the company from recovering in this action for the taxes collected by William McCoach, the defendant's predecessor in office.

Not only, therefore, does the plaintiff in an action against a collector to recover taxes collected by his predecessor fail to receive payment thereof from the United States, but substantial justice demands that a court dismiss a suit against a collector who did not receive the taxes. The collector is without redress. A judgment is entered against him for the doing of an act by a person over whom he had no control. He has not received any of the moneys demanded by the terms of that judgment. The judgment constitutes a lien against his property and he is therefore compelled to pay it. He has no protection from it even though he be an officer of the United States, nor can he be recompensed for money paid out as the result of it.

In the case of *Sage* v. *U. S.* (250 U. S. 33) this court held that a judgment against a collector for the recovery of taxes is in all respects a personal judgment, and that therefore a judgment of part of the taxes due in a suit against the collector for the whole of such taxes and satisfaction of such judgment by the United States does not bar a suit against the United States in the Court of Claims for the remainder thereof. On page 37 the court said:

> It is true that the statutes modify the common-law liability for money wrongfully collected by duress so far as to require a pre

liminary appeal to the Commissioner of Internal Revenue before bringing a suit. (Rev. Stats. sec. 3226.) It is true, also, that it is the duty of the district attorney to appear for the collector in such suits (Rev. Stats. sec. 771); that the judgment is to be paid by the United States and the collector is exempted from execution if a certificate is granted by the court that there was probable cause for his act (Rev. Stats. sec. 989); and that there was a permanent appropriation for the refunding of taxes illegally collected (Rev. Stats. sec. 3699, 17). No doubt, too, if it appeared in a suit against a collector who had acted with probable cause and had turned over his money to the United States, that a part of the tax properly was due to the United States, unnecessary formalities might be omitted and the sum properly due might be retained. Of course, the United States in such a case could not require a second payment of that sum. *But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States.* It is hard to say the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the Court of Claims. *The suit is personal and its incidents,* such as the nature of the defenses open and the allowance of interest, *are different.* It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in *Minnesota* v. *Hitchcock* (185 U. S. 373, 388). *At the time the judgment is entered the United States is a*

> *stranger*. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself.

That the action brought against the collector for the recovery of taxes is a personal action and not one against such collector in his official capacity is further evidenced by the case of *Roberts* v. *Lowe*, supra. In this case the question arose as to whether the plaintiff could sue the defendant as successor to the collector who collected the tax because of the terms of the act of February 8, 1899 (30 Stats. 822), which provides that no action or other proceeding lawfully commenced against any officer of the United States in his official capacity or in relation to the discharge of his official duties shall abate by reason of the expiration of his term. The court said, page 605:

> In this case there was no pending action against the former collector, Anderson; this action is not necessary to recover the money, for the plaintiff has a remedy against the United States, as appears from the decision in the case of *United States* v. *Emery* (237 U. S. 28), as well as against Anderson; and, finally, *this cause of action is not in theory against the collector in his official capacity*.

An action brought against a collector for the recovery of taxes is properly an action for money had and received. This was recognized by the Supreme Court

as early as the case of *Philadelphia* v. *The Collector* (5 Wall. 720), where, at page 731, the court said:

> Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received.

This rule has been subsequently applied in *Elliott* v. *Swartwout* (35 U. S. 137), *Lawrence* v. *Caswell* (54 U. S. 488), and in *Patton* v. *Brady, Executrix* (184 U. S. 608).

In *Patton* v. *Brady* an action was brought against Brady as collector of internal revenue to recover taxes. During the pendency of the action the defendant died and the plaintiff substituted the executrix of the deceased as a party defendant. It was contended that the action was one based upon a tort and as such abated by reason of the death of the defendant. The court held that "the gravamen of the plaintiff's complaint is that he was compelled to pay the defendant the sum of $3,062.28 to protect his property from unlawful seizure for illegal taxes. In such case, having paid under protest, he can recover in an action of assumpsit the amount thus wrongfully taken from him," and as a result the cause of action survives. This conclusion was reached under the common-law rule, applied as the result of section 955 of the Revised Statutes, which provides that when the defendant in any suit in any court of the United States dies before final judgment the executor of such deceased party may "in case the cause of action survives by

law" prosecute or defend any such suit to final judgment, the court saying, page 612, "in the absence of some special legislation the question in each case must be settled by the common law or by the law of the State in which the cause of action arose." See also *James, Administratrix*, v. *Hicks* (110 U. S. 272).

Since the action in this case is not against the collector in his official capacity but is a personal action for money had and received, it will not lie against the plaintiff in error. He did not collect the money and consequently had not received any of it. He can not be held personally liable. In *Roberts* v. *Lowe* (236 Fed. 604) the court said, page 605:

> The theory is a recovery for money illegally obtained by the collector as an individual and no subsequent collector can be subjected to his liability.

And in *Philadelphia H. & P. R. Co.* v. *Lederer* (242 Fed. 492) the court held, page 494:

> The basis of an action against the collector is his receipt of the tax, and if he has not received it we do not see how he can be called on to pay it back; and the fact that Lederer was the channel by which the commissioner transmitted the refusal to refund did not impose liability. Lederer was liable, if at all, for the tax of 1912, for this had come into his own hands; but no statute made him liable for money that was collected by his predecessor, but had never been sued for.

In the case of *Cincinnati Gas & Electric Co.* v. *Andrew C. Gilligan, Collector of Internal Revenue* (not yet reported), the District Court of the United States for the Southern District of Ohio had under consideration the identical question now before this court. In that case an action was commenced against the collector, Gilligan, for the recovery of taxes paid to his predecessor in office.

In rendering its decision, the court said:

> Suits against collecting officers to recover taxes are properly brought against the officer who collects them, and not against his successor, ordinarily. That is the reason for the rule that it is necessary to protest at the time the taxes are paid and to give notice that suit will be brought to recover back the taxes; to enable the collecting officer to protect himself, as far as he may, upon making his settlement. It is further provided by statute that in such an action, upon certificate by the judge that there was reasonable or probable cause for making the collection, the Government will assume the liability. In the case of a collection made arbitrarily, without reasonable or probable cause, a mere extortion in office, the collecting officer would be left with the liability upon his own hands. The decision of the Supreme Court in the case of *United States* v. *Sage* (250 U. S. 83) and the cases cited, *Roberts* v. *Lowe* (236 Fed. 604), and *Philadelphia H. & P. R. Co.* v. *Lederer* (242 Fed. 492), leave no doubt as to the nonliability of the successor in office of the collector who thus received taxes under protest. * * *

> It is therefore concluded that the defendant, Andrew C. Gilligan, is not liable for taxes unlawfully collected by his predecessor in office, Bernard Dettman, and that the demurrer to the petition must be sustained.

The Indiana Steel Company apparently relies upon the provisions of the act of February 8, 1899 (30 Stat. 822; Comp. Stat. sec. 1594), and upon the decision in the case of *Armour* v. *Roberts* (151 Fed. 846).

The act of February 8, 1899, provides:

> No suit, action, or other proceeding lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity or in relation to the discharge of his official duties shall abate by reason of his death or the expiration of his term of office or his retirement or resignation or removal from office, but in such event the court on motion or supplemental petition at any time within twelve months thereafter showing the necessity for the survival thereof, to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor and the court may make such order as shall be equitable for the payment of costs.

It is contended by the Indiana Steel Company that inasmuch as the act of 1899 provides that no suit, action, or other proceeding lawfully commenced against an officer of the United States in his official capacity shall abate by reason of his death or the expiration of his term of office, but in such event the court may allow the same to be maintained by or

against his successor in office, a suit against a collector is in substance one against the United States. But the conclusion is a *non sequitur*. That act only provides for a continuation of an action already begun and makes the successor in office the nominal defendant instead of the real defendant. The action is still against the original collector and is not a new action. The statute itself speaks of the "*survival thereof.*" When a certificate of probable cause is issued, it is issued in favor of the collector who collected the taxes in the same manner as if an administrator had been appointed, as was done in the case of *Patton* v. *Brady*, *supra*.

The fallacy of the contention that an action to recover taxes illegally and erroneously collected by a predecessor is properly brought against the collector in office at the time when it is instituted is readily apparent in the case where a certificate of probable cause will not issue. In such case the judgment would constitute a lien upon the property of the collector, who was in no manner responsible for the illegal act of his predecessor. He would have no protection, because recovery from the United States would be impossible. If probable cause means anything it means that there was reason for the action. But if it had been wholly unauthorized why should the collector in office be held liable because he is an official of the United States? And there is no doubt that if counsel for the company are correct in their contentions, an innocent party may be compelled to pay for the wrongdoing of another.

In the case of *Armour* v. *Roberts* the District Court for the Western District of Missouri held that where the collector wrongfully received an inheritance tax on bequests which were not taxable, the tax having been paid under protest, there was an implied contract to refund the same, and that "the collector was acting for the Government, and it is the duty of his office to refund and it is the duty of the Commissioner to furnish the money with which to refund" (p. 853).

This decision has not been followed by other courts, but in effect has been overruled by the later decisions of *Roberts* v. *Lowe*, *supra*; *Philadelphia H. & P. R. Co.* v. *Lederer*, *supra*; and *Sage* v. *United States*, *supra*.

It may be argued that the taxpayer, having been wrongfully compelled to pay a tax, his right to recover the same should not be defeated by reason of the fact that the collector to whom it was paid is no longer in office. While the aggrieved taxpayer has no right of action against the successor in office, he may have his remedy in an action against the United States under the act of March 3, 1887, known as the Tucker Act.

Roberts v. *Lowe*, 236 Fed. 604.

Phila. H. & P. R. Co. v. *Lederer*, 239 Fed. 184.

U. S. v. *Emery et al.*, 237 U. S. 28, 32.

Sage v. *U. S.* 250 U. S. 33.

CONCLUSION.

An action in assumpsit for money had and received is the appropriate remedy to recover back taxes erroneously assessed and illegally exacted. (*Philadelphia* v. *Collector*, 5 Wall. 720; *Elliott* v. *Swartwout*, 10 Pet. 150.) Such an action can not be maintained against one who never had or received the money.

An action against the collector for recovery of taxes erroneously or illegally exacted is an action personal to him, and not one against him in his official capacity as a representative of the United States. (*Sage* v. *U. S.*, 250 U. S. 33, 37; *Roberts* v. *Lowe*, 236 Fed. 604, 605; *Phila. H. & P. R. Co.* v. *Lederer*, 242 Fed. 492.) The action being personal to the collector who exacted and received the money, his successor in office is in no way responsible for his illegal acts and can not be held to have assumed his liabilities, *Id.*

As the action to recover back taxes paid under protest to a collector of internal revenue is a personal action against the collector and may be maintained only against the collector who collected such taxes, it follows that each of the questions certified to this court should be answered in the negative.

JAMES M. BECK,
Solicitor General.

ALBERT OTTINGER,
Assistant Attorney General.

SEPTEMBER, 1921.

OCT 4 1921
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 710. 214

JULIUS F. SMIETANKA, Collector of Internal Revenue for the First District of Illinois.

VS.

INDIANA STEEL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR INDIANA STEEL COMPANY.

WILLIAM BEYE,
Attorney for Indiana Steel Company.

K. K. KNAPP,
R. W. CAMPBELL,
Of Counsel.

(28067)

BARNARD & MILLER PRINT, CHICAGO

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1920.

No. 710.

JULIUS F. SMIETANKA, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS,

vs.

INDIANA STEEL COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR INDIANA STEEL COMPANY.

STATEMENT OF THE CASE.

I.

This case is before this court on certificate from the United States Circuit Court of Appeals for the Seventh Circuit before which court the cause was pending on writ of error to reverse a judgment rendered in the District Court of the United States for the Northern District of Illinois, Eastern Division, in favor of the Indiana Steel Company and against Julius F. Smietanka, Collector of Internal Revenue for the First District of Illinois.

The suit was to recover corporation excise taxes erroneously assessed against the company and paid by it under protest. The payment was made to S. M. Fitch, the Collector of Internal Revenue for the United States for the First District of Illinois who was succeeded by Julius F. Smietanka as such collector. The latter was the collector in office at the time suit was brought. (Rec., 2.)

In or as a part of the judgment of the District Court the District Court certified there was probable cause for the act done by the collector in the collection of such amounts from the company, and that in making the collections he acted under the direction of the Commissioner of Internal Revenue, and that the amounts recovered shall be provided for and paid out of the proper appropriation from the Treasury of the United States. (Rec., 3.)

The District Court certificate constituted the judgment as one against the United States.

The questions certified are:

> "1. Assuming that the declaration states a good cause of action had the suit been brought against S. M. Fitch, the internal revenue collector who actually collected and received the taxes, does it state any cause of action whatever against said S. M. Fitch's successor in office, the plaintiff in error, against whom the suit was brought, but who had no participation in the collection, receipt or disbursement of such taxes?
>
> 2. May suit in the District Court of the United States properly be brought and maintained against a United States collector of internal revenue for the recovery of the amount of a United States internal revenue tax, unlawfully assessed and collected but in the collection and disbursement of which such collector had no agency, the entire transaction of such assessment, collection and disbursement having occurred during the incumbency of such office of a predecessor in office of such collector?"

There is thus presented for decision the single question of whether a suit to recover internal revenue taxes erroneously assessed and paid under protest may be brought against the internal revenue collector in office at the time suit is brought who is the successor of the internal revenue collector to whom the payment of the taxes was made.

BRIEF.

I.

THE ACTION WAS PROPERLY BROUGHT AGAINST THE COLLECTOR WHO WAS IN OFFICE AT THE TIME OF THE COMMENCEMENT OF THE SUIT.

(a) The United States has by statute "*enacted a system of corrective justice*" by which the taxpayer is permitted "*to sue the Government through its Collector*" and if the tax "was wrongfully exacted the courts will give him relief by a judgment which the United States pledges herself to pay."

Cheatham v. *U. S.*, 92 U. S. 85-88.

"Parties compelled to pay an illegal assessment ought to have *a convenient remedy* to redress the injury."

Philadelphia v. *Collector*, 5 Wall. 720-733.

(b) The statutes under consideration were intended to provide a remedy for the recovery of taxes from the United States and the action for such recovery is in fact against the United States. The collector is only the nominal defendant.

(c) The statute requiring the collector to pay the moneys collected by him into the treasury of the United States took away the common law action theretofore existing, and provided only a purely statutory remedy, which, while not in form is in substance against the United States.

Hubbard v. *Collector*, 12 Wall. 1, 11-13.

Carey v. *Curtis*, 3 How. 236.

Philadelphia v. *Collector*, 5 Wall. 720-732.
Schoenfeld v. *Hendricks*, 152 U. S. 691.
Kinney v. *Connat*, 166 Fed. 720.
United States v. *Frerichs*, 124 U. S. 315.
Savings Institution v. *Blair*, 116 U. S. 200-205.
Arnson v. *Murphy*, 115 U. S. 579.

(d) The personal liability of the collector having been removed by statute the action is now against the collector in his official capacity. The proper defendant is the collector in office at the time suit is commenced.

Armour v. *Roberts*, 151 Fed. 846.

(e) The pertinent statutes are the following:

Section 3220 R. S. provides:

> "The Commissioner of Internal Revenue subject to regulations prescribed by the Secretary of the Treasury, is authorized * * * to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal taxes collected by him with the cost and expenses of suit."

Section 3219 R. S. provides that upon the death, resignation or removal of a collector he shall turn his lists and accounts over to his successor.

Section 3224 R. S. provides that no suit shall be maintained for restraining the assessment or collection of any tax.

Section 3226 R. S. provides that no suit shall be maintained in any court for the recovery of any Internal Revenue tax until appeal shall have been made to the Commissioner of Internal Revenue.

Section 3227 R. S. provides that suits for the recovery of taxes must be brought within two years next after the cause of action accrues.

Section 3228 R. S. provides that all claims must be filed with the Commissioner of Internal Revenue within two years next after the cause of action accrues.

Section 3210 R. S. provides that the Collector of Internal Revenue shall pay into the Treasury of the United States the gross amount of all taxes collected without any abatement or deduction whatsoever.

Section 771 R. S. provides that the district attorney shall appear in behalf of the defendants in all suits or proceedings pending in their district against collectors or other officers of Internal Revenue "for any act done by them or for the recovery of any money exacted by or paid by such officers and by them paid into the treasury.

Section 3689 R. S. provides for a permanent appropriation for the purpose (17) of refunding and paying back duties erroneously collected or illegally assessed or collected under the Internal Revenue Laws.

Section 989 R. S. provides:

> "When a recovery is had any suit or proceeding against a collector or other officer of the revenue for any act done by him or for the recovery of any money exacted by or paid to him into the treasury in the performance of his official duty and the court certifies that there was probable cause for the act done by the collector or other officer or that he acted under the direction of the Secretary of the Treasury or other proper officer of the Government no execution shall issue against such collector or other officer but the amount so recovered shall upon final judgment be provided for and paid out from the proper appropriation from the treasury."

The Act of February 8, 1899 (30 Stat. 822 U. S. Comp. Stats. 1916, Sec. 1594), provides:

> "No suit, action or other proceedings lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity or in relation to the discharge of his

official duties shall abate by reason of his death or the expiration of his term of office or his retirement or resignation or removal from office, but in such event the court on motion or supplemental petition at any time within twelve months thereafter showing the necessity for the survival thereof, to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor and the court may make such order as shall be equitable for the payment of costs."

(f) Remedial statutes should be liberally construed to accomplish the purpose of their enactment. Sections 989, 3220 and 771 of the Revised Statutes were enacted for the purpose of providing that the Government by its attorneys should defend suits against its collectors and pay the judgments recovered in matters pertaining to the revenue. These statutes are for the protection of the Government against improper judgments and the protection of the collectors against personal pecuniary liability. The wording of the statutes as well as the effect of the construction to accomplish the purpose of their enactment clearly shows

(1) The Government's attorneys should defend a suit against and the Government has obligated itself to pay a judgment rendered against a collector who did not collect the taxes and pay them into the public treasury but succeeded to the collector who collected the taxes and paid them into the public treasury, otherwise

(2) If the suit must be against the collector out of office who during the time of holding office collected the taxes and such collector becomes a non-resident of the United States and hence suit can be brought against him only outside of the United States then the Government is without representation in such suit as Section 771 limits the appearance of a United States District Attorney to a suit pending in his district which must be within the United States and it is manifest that the power of the court of a foreign jurisdiction to enter a

certificate of probable cause will not be derived from the laws of the United States and certainly it is not contemplated that the court of the foreign jurisdiction shall have power to fix the liability of the United States by such a certificate in a cause wherein the attorneys of the United States are not empowered to represent the Government.

The wording of the statutes and the construction to be given to them follows, the words in italics being the effect of the construction and the words in parentheses being the pronouns which appear in the statute:

"Section 989—When a recovery is had in any suit or proceeding against a collector or other officer of the Revenue for any act done by *a collector or other officer* (him), or for the recovery of any money exacted by or paid to *a Collector or other officer* (him) and by *a Collector or other officer* (him) paid into the Treasury in the performance of *a Collector's or other officer's* (his) official duty, and the court certifies that there was probable cause for the act done by the Collector or other officer or that the *Collector or other officer* (he) acted under the direction of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such Collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

Section 3220—The Commissioner of Internal Revenue, subject to Regulations prescribed by the Secretary of the Treasury, is authorized * * * to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against *any collector or deputy collector* (him) in any court, for any internal taxes collected by *any collector or deputy collector* (him) with the costs and expenses of suit. Also all damages and costs recovered against any assessor or assistant assessor, collector, deputy collector or inspector in any suit brought against *any assessor, assistant assessor, collector, deputy collector or inspector* (him) by reason

of anything done in the due performance of *any assessor's, assistant assessor's, collector's, deputy collector's or inspector's* in (his) official duty.

Section 771—it shall be the duty of every district attorney * * * unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings *pending in his district* against collectors, or other officers of the revenue, for any act done by *collectors or other officers of the revenue* (them) or for the recovery of any money exacted by or paid to such *collectors or other officers of the revenue* (officers) and by *such collectors or other officers of the revenue* (them) paid into the Treasury."

ARGUMENT.

I.

THE ACTION WAS PROPERLY BROUGHT AGAINST THE COLLECTOR IN OFFICE AT THE TIME OF THE COMMENCEMENT OF THE SUIT.

Originally and upon common law principles the action was against the individual who presuming to act as collector but in fact without authority of law collected the taxes through the duress of the power of his official office. Such a collector was personally liable when the tax was collected without the authority of law whether he acted upon his own initiative or upon the direction of a superior officer. Being so personally liable it was the practice for him to retain moneys collected to abide the determination of the claim that they were unlawfully collected and thus indemnify himself in the event he was required to repay the tax to the taxpayer.

It was the theory of the action that the collector was acting as an individual in that he was acting without authority in law; that he had received the money of the taxpayer and was liable in an action of assumpsit for money had and received.

Subsequently Congress, in order to prevent the retention of moneys by collectors for indemnification and to bring into the treasury promptly all taxes collected, enacted a statute which requires all taxes collected to be promptly paid into the Treasury. This legislation destroyed the personal liability of the collector. No longer was the collector liable in person for taxes collected in error.

From the time of the passage of this statute there ceased the common law action for money had and received as a remedy of a taxpayer against the collector. The facts could no longer support the fundamental theory of such an action. The decisions of the Supreme Court of the United States clearly state the reasons. The collector did not have the money in that by statute he had been required to and did pay the tax collected into the Treasury, and the law would not raise an implied agreement of the collector to repay to the taxpayer the tax which the law by statute had declared should be paid to the Government. The law would not raise an implied agreement to do that which was against the express provisions of the statute.

Thus until subsequent legislation the taxpayer was without remedy. The collector was not personally liable and the Government could not be sued in that the consent of the Government had not been given.

Subsequently, commencing in the year 1864 and following, what was intended to be a complete system of taxation and "corrective justice" was established by Congress. A number of statutes were enacted which were intended to provide prompt and ready collection of taxes and a convenient and ready remedy to the taxpayer for the recovery of taxes erroneously collected from him.

None of these statutes in terms authorized an action to be brought against any collector. All of the statutes recognized by implication that an action may be brought against a collector in his official capacity and as the agent of the Government for the purpose of ascertaining the validity of the claim against the Government. The statutes expressly provide for the payment by the Government of judgments rendered in such actions.

As the Supreme Court of the United States clearly in-

dicates, the old action of money had and received had ceased to exist. The right of an action of implied assumpsit had arisen out of the clear implication of the statutes that the taxpayer should have a remedy and that the Government would pay the judgment rendered.

It was a statutory implication arising out of the obligation of the Government to pay. The implication is against the Government, not against the collector personally.

Nowhere in the statutes is there any provision that the suit may be against a collector. But by reason of the implication of the statutes it has been uniformly held that the collector, as the official representative of the Government, may be sued.

Nowhere in the statutes is there any provision that the suit shall be against the collector who collected the tax whether or no he was in office at the time suit was commenced, nor is there any express provision in the statutes that the suit shall be brought against the collector in office at the time suit is commenced who may have succeeded to the collector who collected the tax. The statutes are silent as to which collector shall be sued.

The question will have to be decided upon the implication of the statutes as to whether it is intended that a suit affecting the revenue shall be against an individual who has ceased to represent the Government and has no connection with it and is not interested officially or otherwise, or whether the suit may be against the collector in office who is the representative of the Government and interested officially in the matters to which the suit pertains.

The question has not been decieded by the Supreme Court of the United States. The question will have to be decided upon the clear implication of these statutes and not upon the expressed wording thereof.

The question should be decided upon that implication from the statutes which will accomplish the purpose of their enactment. This purpose was to furnish a prompt collection of taxes and a "system of corrective justice" by which the taxpayer should have a convenient remedy. The statutes were intended to provide protection to the Government, protection to its collectors and to its taxpayers.

The company contends that, in the light of the purposes of the statutes, the protection of the Government, its collectors in the performance of their duties and of its taxpayers is best accomplished by permitting the action against the collector in office at the time suit is commenced, and therefore within the purpose of the statutes and by the necessary implication from the language thereof the present action was properly brought.

The decision of the question before the court depends, in the main, upon the construction of the statutes.

Section 3220 of the Revised Statutes (U. S. Compiled Statutes, 1916, Sec. 5944), provides as follows:

> "The commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; *also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit;* also all damages and costs recovered against any assessor, assistant assesor, collector, deputy collector or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty; provided, that where a second assessment is made in case of a list, statement, or return which in the opinion of the

collector or deputy collector was false or fraudulent, or contained any understatement or undervaluation such assessment shall not be remitted, nor shall taxes collected under such assessment be refunded, or paid back, unless it is proved that said list, statement or return was not false or fraudulent, and did not contain any understatement or undervaluation."

This section creates a statutory right of action against the collector for moneys wrongfully collected. The company contends that this right of action is against the collector in his official capacity, whereas counsel for the Government insists that the action must be maintained against the collector who actually collected the money. The other sections of the statutes which bear upon the questions are as follows:

Section 3219, R. S. (U. S. Compiled Statutes, 1916, 5943), provides that upon the death, resignation or removal of a collector, his lists and accounts shall be turned over to his successor.

Section 3224, R. S. (U. S. Comp. Stats., 1916, Sec. 5947), provides that no suit shall be maintained for the purpose of restraining the assessment or collection of any tax.

Section 3226, R. S. (U. S. Comp. Stats., 1916, Sec. 5949), provides that no suit shall be maintained in any court for the recovery of any internal tax until appeal shall have been made to the Commissioner of Internal Revenue.

Section 3227, R. S. (U. S. Comp. Stats., 1916, Sec. 5950), provides that suits for the recovery of taxes must be brought within two years next after the cause of action accrues.

Section 3228, R. S. (U. S. Comp. Stats., 1916, Sec. 5951), provides that claims must be filed with the Com-

missioner of Internal Revenue within two years next after the cause of action accrues.

Section 3210, R. S., provides that the Collector of Internal Revenue shall pay daily into the treasury of the United States, the gross amount of all taxes collected, without any abatement or deduction whatsoever.

Section 771, R. S., (U. S. Comp. Stats., 1916, Sec. 1296) provides that *District Attorneys shall appear* in behalf of the defendants in all suits or proceedings pending in their district against collectors or other officers of Internal Revenue, "*for any act done by them or for the recovery* of any money *exacted by, or paid to, such officers* and by them paid into the Treasury."

Section 3689, R. S. (U. S. Comp. Stats., 1916, Sec. 6799) provides for a *permanent appropriation* for the purpose (17) of refunding and paying back, duties erroneously or illegally assessed or collected under the Internal Revenue laws.

Section 989, R. S. (U. S. Comp. Stats., 1916, Sec. 1635) provides as follows:

> "When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money *exacted by or paid to him and by him paid into the Treasury*, in the performance of his official duty, and the *court certifies* that there was probable cause for the act done by the collector or other officer, or that *he acted under the directions of the Secretary of the Treasury* or other proper *officer* of the Government, *no execution shall issue* against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

The Act of February 8, 1899 (30 Stat. 822, U. S. Comp. Stats., 1916, Sec. 1594), which is as follows:

"*No suit*, action or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in a relation to the discharge of his official duties, *shall abate by* reason of his death, or *the expiration of his term of office*, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed, *at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved*, may allow the same to be maintained by or *against his successor in office*, and the court may make such order as shall be equitable for the payment of costs."

Under the above sections of the statutes, can the company maintain his action against the successor of the collector to whom the taxes were paid? This precise question has been passed upon in four opinions, three District Court decisions and one by the Circuit Court of Appeals of the Third Circuit. In the first of these opinions the action against the successor was sustained, but in the others it was held that the successor was not liable. *Armour* v. *Roberts*, 151 Fed. 846:

In this case, decided by Judge McPherson, in the Western District of Missouri the court overruled a demurrer to a petition praying for the refund of certain inheritance taxes assessed under the Act of 1899. The taxes had been paid to Frank D. Roberts, as collector, but the suit was brought against Charles W. Roberts, the collector at the time the action was begun. There were four grounds of demurrer but only the last is material to this discussion. Beginning upon page 852, the court held, first, that the action was based upon an implied agreement to refund; second, that the collection was made by the collector within his official duties, and that the responsibility results from the office.

His argument is based upon the following grounds:

(a) The collector is not personally liable, as he was not personally in the wrong.

(b) The suit to recover the money is a part of the system of corrective justice.

(c) The collector only made the collection as a part of his official duty, while the assessment was made by the Commissioner.

(d) The collector's records are turned over to his successor upon the former's death.

(e) Under the Act of February 8, 1899, the successor shall be substituted as a defendant.

(f) Taxes collected are paid into the Treasury.

(g) It is the duty of the Commissioner to pay any judgment against a collector.

(h) The collector has no personal interest, but judgments against him must be paid by the Commissioner out of public funds.

(i) To all purposes, the action is against the Government.

Roberts v. *Lowe*, 236 Fed. 604:

In this case Judge Hand, in the Southern District of New York, sustained a demurrer to a complaint filed against the collector of Internal Revenue to recover excise taxes paid to his predecessor. Judge Hand sustained the demurrer for the following reasons:

(a) The action should have been against the collector who received the money, because only he, under Section 989, could obtain restitution from the Treasurer.

(b) The remedy lies either against the collector who received the money or the United States.

(c) The decision of the Supreme Court in *Patten* v. *Brady*, 184 U. S. 608, holding that an action against the collector might be revived in the name of his executrix, is inconsistent with the theory of an action against the collector as such.

(d) The Act of February 8, 1899, does not apply, because there was no action pending against the collector.

(e) The cause of action is not, in theory, against the collector in his official capacity.

In conclusion, he says that Judge McPherson apparently misconceived the nature of the action, which is an action against the collector personally.

Philadelphia H. & P. R. Co., et al., v. *Lederer, Collector of Internal Revenue*, 239 Fed. 184:

This case was decided by Judge Thompson of the Eastern District of Pennsylvania.

It involved the recovery of excise taxes under the 1909 law, part of which were paid to the defendant and part to his predecessor in office. The court entered judgment upon the verdict for the taxes paid to the defendant, but denied the right of the plaintiff to recover taxes paid to the predecessor of defendant. The court concluded that recovery could not be had for the sums paid to the collector's predecessor for the following reasons:

(a) There is no common law ground for an action against the collector's successor.

(b) The fact that the judgment may be paid out of the United States Treasury does not give a right of action against the collector's successor.

(c) Mandamus and injunction suits brought against an official have been held to abate upon the official's death or removal from office.

(d) The Act of February 8, 1899, applies only to suits which already have been commenced against the proper officer. The plaintiff could have sued the prior collector or could have brought suit under the Tucker Act.

(e) Section 989 does not authorize a certificate of probable cause, except in favor of the collector to whom the tax was paid, and the granting of such a certificate is discretionary and not reviewable, wherefore the succeeding collector might become personally liable for the act of his predecessor.

(f) The court concurs with Judge Hand in holding that the conclusion of Judge McPherson was not well founded.

Philadelphia H. & P. R. Co. v. *Lederer*, 242 Fed. 492:

The Circuit Court of Appeals of the Third Circuit,

affirmed the judgment in this case for the reasons given by Judge Thompson, and for the following specific reasons:

(a) Without statutory permission, no suit may be maintained to recover a federal tax.

(b) The statutes must be strictly obeyed.

(c) The Act of 1899 does not apply.

(d) The basis of an action against a collector is his receipt of the tax and the fact that it has come into his own hands.

The conclusion reached by Judges Hand and Thompson and by the Circuit Court of Appeals of the Third Circuit, was erroneous, and that of Judge McPherson correct.

1. THE STATUTES UNDER CONSIDERATION WERE INTENDED TO PROVIDE A CONVENIENT REMEDY FOR THE RECOVERY OF TAXES FROM THE UNITED STATES, AND THE ACTION FOR SUCH RECOVERY IS IN EFFECT AGAINST THE UNITED STATES. THE COLLECTOR IS ONLY THE NOMINAL DEFENDANT.

Prior to the enactment of the statutes providing for a remedy for the taxpayer who has paid taxes wrongfully assessed, the courts held that the collector was liable in a common law action of implied assumpsit. The basis of this liability is fully discussed in *Elliott* v. *Swartwout*, 10 Peters 137, where the court held that the *Collector of the Port of New York* would be *liable* for DUTIES *erroneously collected* and paid under protest, although he might have paid the money over into the treasury, saying, at page 158:

> "From this view of the cases, it may be assumed as the settled doctrine of the law that, where money is illegally demanded and received by an agent he cannot exonerate himself from personal responsibility by paying it over to his principal, if he has had notice not to pay it over. The answer, therefore, to the third point must be, that the collector is

personally liable to an action to recover back an excess of duties paid to him as collector, under the circumstances stated in the point; *although he may have paid over the money into the treasury.*"

Protest, the court held in the above case, was necessary to fix the liability in order that the collector might *either retain the money* in his own possession *or indemnify himself* against the Government.

After the decision in the above case, Congress passed the *Act of March 3, 1839, requiring the payment into the Treasury by any collector of customs* of all moneys paid to him, even though paid under protest. The Circuit Court of the United States for the Southern District of New York, was in doubt as to whether this was a bar to an action against a collector for duties illegally collected by him, even though paid under protest, and *certified this question* to the *Supreme Court*, which held, in *Cary* v. *Curtis*, 3 How. 236, that the act constituted a defense.

The Act of 1839, the court said, left the collector "no lien upon, or discretion over, the sums received by him on account of the duties described therein, but as converting him into the *mere bearer of those sums to the Treasury* of the United States." The court said further, that after the passage of this act, not only was there no right in the collector of retaining moneys paid under protest, but all persons making payment to the collector did so with the knowledge that the collector was the mere instrument or vehicle to convey the sums paid into the Treasury. This Act removed the implications on which *Elliott* v. *Swartwout* rested.

The above act, the court said on page 242, "*has* ordered and declared those collectors to be the *mere organs of receipt and transfer*, and has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid."

In concluding that after the passage of the Act of 1839 the collector was no longer liable, the court, upon pages 246 and 247 discusses the basis of the action of implied assumpsit and the reasons for its inapplicability, as follows:

> "The action of assumpsit for money had and received, it is said by Lord Mansfield, Burr. 1012, *Moses* v. *Macfarland*, will lie in general whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in *Stratton* v. *Rastall*, 2 T. R. 370: 'That this action has been of late years extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action, the party must show that he has equity and conscience on his side, and could recover in a court of equity.' These are the general grounds of the action as given from high authority. There must be room for implication as between the parties to the action, and the recovery must be *ex æquo et bono*, or it can never be. If the action is to depend on the principles laid down by these judges, and especially by Buller, a case of hardship merely could scarcely be founded upon them; much less could one of injustice or oppression, nor even one which arose from irregularity or indiscretion in the plaintiff's own conduct. *So far* as the liability of agents in this form of action appears to have been considered, the general rule certainly is that the action should be brought against the principal and not against a known agent, who is discharged from liability by a *bona fide* payment over to his principal, unless anterior to making payment over he shall have had notice from the plaintiff of his right and of his intention to claim the money. The absence of notice will be an exculpation of the agent in every instance. And with regard to the effect of the notice in fixing liability upon the agent, that effect is dependent on the known powers of the agent and the character of his agency. If, for instance, the agent was known to be a mere carrier or vehicle to transfer to his employer the amount re-

> ceived, payment to the agent with such knowledge, although accompanied with a denial of the justice of the demand, would seem to exclude every idea of an agreement, express or implied, on the part of the agent to refund; and could furnish no ground for this action against the agent who should pay over the fund received to his principal."

And again, on pages 249 and 250, the court says that in view of the obligation of the collector to pay the money over to the Government, *even an express promise of repayment would be void* as being in violation of the officer's duty.

After the decision in this case, there was *no common law ground for an action* against the collector.

In *City of Philadelphia* v. *The Collector*, 5 Wall. 720, the defendant contended that the third section of the *Act of the 3rd of March*, 1865, requiring the collector to pay daily into the Treasury the revenues collected by them, had the same effect with respect to Internal Revenue collectors as the Act of 1839, discussed in *Cary* v. *Curtis* (*supra*), to-wit: not being personally liable he was not subject to suit; but the court held that he could be sued as collector in that the Internal Revenue Acts contemplated that judgments against collectors shall be paid by the Commissioner of Internal Revenue, and that *such judgments are in the nature of recoveries against the United States*. Furthermore, it is not material whether the collectors are required to account daily or monthly, as only the Commissioner pays the judgments, costs and expenses of suit. The language of the court upon this subject is as follows, page 732:

> "None of the internal revenue acts, however, contemplate that collectors shall reimburse themselves for the amount of any judgment recovered against them on account of duties illegally or erroneously assessed and paid under protest. Direction in those

> acts is, without exception, that all such judgments shall be paid by the commissioner, including, by the latter acts, costs and expenses of suit. Clear implication of the several provisions is, that a judgment against the collector in such a case is *in the nature of a recovery against the United States*, and that the amount recovered is regarded as a proper charge against the revenue collected from that source. Evidently, therefore, it is not material in this inquiry whether the collectors of the internal revenue are required to account daily or monthly, or whether they are required to pay into the treasury the gross or only the net amount of collections, so long as this provision authorizing the commissioner to pay such judgments, costs and expenses of suit, remains in full force."

From the last two cases it is clear that under the system of statutes covering the refunding of Internal Revenue taxes, there is *no personal liability* upon the part of the collector. The action is still an implied assumpsit, but the collector is only the nominal defendant and the *implied agreement* to repay *is not upon his part but upon the part of the United States.* These statutes, as was said in *Nichols* v. *United States*, 7 Wall. 122, are for the purpose of enabling the taxpayer to *test the question* of *his liability* in the courts in holding that a protest was a condition precedent to suit, and that claims under the revenue laws were not within the jurisdiction of the Court of Claims; the court said in this case, page 131:

> "While the Government is desirous to secure the citizen a mode of redress against erroneous assessments or collections, it says to him, we want all controverted questions concerning the revenue settled speedily, and if you have complaint to make, you must let the Commissioner of Internal Revenue know the grounds of it; but if he decides against you, or fails to decide at all, you can test the question in the courts if you bring your suit within a limited period of time."

In *Hubbard* v. *The Collector*, 12 Wall. 1, the court discussed at length upon pages 11, 12 and 13, the basis of suit against the collector. Following *Cary* v. *Curtis* (*supra*), it holds that there is *no personal liability* on the part of the collector to repay money which he has already paid into the Treasury. The *action is not* based *upon the implied promise* at common law, *but upon the statute*, and is a statutory action, the court saying at page 13:

> "Such a *defense* (to-wit: payment into the treasury of the money collected), therefore, cannot avail the defendant in this case, as the right of action, *though in form an action of assumpsit, is grounded upon the act of Congress* providing for the assessment and collection of taxes, which will sufficiently appear from a single suggestion. None of the internal revenue acts contemplate that the collectors shall reimburse themselves for the amount of any judgment recovered against them on account of duties illegally or erroneously assessed and collected. On the contrary, the act of Congress expressly provides that the Commissioner of Internal Revenue shall repay to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them in any court for any internal duties or licenses collected by them, with the costs and expenses of suit."

It will be noted, the court says, that the action is only "in form an action of assumpsit." The acts in question permit a suit against the Government, through its collector, and the United States pledges itself to repay any judgment obtained against the collector.

As has been said before, the suit is in effect against the Government. This was very clearly held in *Cheatham* v. *United States*, 92 U. S. 85. The recovery in this case was denied because the suit was not brought within six months from the date of the decision of the Commissioner, and because no appeal was taken from the second assessment. That the suit was one against the Govern-

ment, appears very clearly from the statement of the court at the top of page 89, where it says, "the Government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues." That the suit is against the Government is equally clear from the discussion of the court on page 88, where it says:

> "Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects, the United States have, as was said by this court in *Nichols* v. *United States*, 7 Wall. 122, *enacted a system of corrective justice*, as well as a system of taxation, in both its customs and internal-revenue branches. That system is intended to be complete. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the Government, the law permits the party, on paying the money required, with a protest embodying the grounds of his objection to the tax, *to sue the government through its collector*, and test in the courts the validity of the tax.
>
> So, also, in the internal revenue department, the statute which we have copied allows appeals from the assessor to the commissioner of internal revenue; and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and, if the money was wrongfully exacted, the courts will give relief by a judgment, *which the United States pledges herself to pay.*"

That the courts consider such cases in effect against the Government is shown by the statement in *Arthur* v. *Cumming*, 91 U. S. 362, a suit against the Collector of Customs, where the court says, on page 363, "*the United States adduced*" no testimony, and where, upon the next page, the court refers to "*the counsel for the United*

States." In a similar case, *Arthur* v. *Morrison*, 96 U. S. 108, the court on page 109 refers to "*the argument of the Government.*"

Again, in *Arnson* v. *Murphy*, 115 U. S. 579, an action against the collector for the recovery of duties, the court says, page 585:

> "The Government had by statute, as to both the customs and the internal revenue departments, prescribed the conditions on which it would *subject itself to the judgments of the courts* in the collection of its revenues; and that the prescription of a time within which a suit must be brought for the purpose is a condition on which *alone the Government consents to litigate* the lawfulness of the original tax."

To the same effect is *Savings Institution* v. *Blair*, 116 U. S. 200, where it appears that suit may be brought against the collector only upon the conditions prescribed in the statutes, making it perfectly clear that the collector is the representative of the Government for the purpose of the suit. Here the court says, page 205:

> "We regard the presentation of the claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition *on which alone the Government consents to litigate* the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the Commissioner within the time and in the manner pointed out by law and relief has been denied him."

In *U. S.* v. *Shearman*, 98 U. S. 565-567, it was held that when the certificate of probable cause is given the United States is then under obligation to pay the judgment.

In *United States* v. *Frerichs*, 124 U. S. 315, in a case appealed from the Court of Claims, the court held that after a judgment against the collector, the *real creditor of the United States* was not the collector, but the plain-

tiff. Furthermore, it appears from page 319, that it has been the uniform practice of the Commissioner of Internal Revenue to make allowances after judgments to the judgment creditor and not require the collector first to pay the judgments out of his own money. That the statute requiring the collector to pay all moneys collected by him into the Treasury, took away the common law action and provided one purely statutory, was held by Chief Justice Fuller in *Schoenfeld* v. *Hendricks, Collector*, 152 U. S. 691.

The Circuit Court of Appeals of the First Circuit in *Kinney, Collector*, v. *Conant*, 166 Fed. 720, where the court sustained the right of the plaintiff to recover interest, on page 721, said that the suit, while not in form, was in substance against the United States.

From the foregoing opinions, it seems entirely clear that the statutes under consideration were intended to, and do, provide a *right of action* indirectly *against the United States* through the collector. The United States merely holds out its *collector as its agent* against whom suits may be prosecuted for the purpose of recovering moneys illegally exacted. There is *no personal liability upon the part of the collector*,—merely an official liability. From this it would seem to follow necessarily, that the *action should be brought against the collector in office* at the time the suit is brought, as *he is the only agent of the United States at that time.*

In cases of this kind, the *collector* is merely the *nominal defendant*, and it would *seem immaterial whether* the suit was brought against the *collector* who collected the money *or* his *successor* in office, so long as the Government has an opportunity to defend. The question before the court is whether or not the United States has received moneys which properly belong to the plaintiff.

Under Section 771, R. S., it is the duty of the District Attorneys to defend suits of this character. This case was defended by the United States District Attorney. Certainly, the Government is very much more likely to hear of such actions and to be in position to defend them if they are brought against the collector in office rather than against the collector's predecessor.

A suit brought against the succeeding collector is tried in the district court of the collection district where the tax payment was made. Every reason of convenience to the Government would seem to require that the suit be there tried.

If the suit must be against the person of the collector out of office it may well be that his residence is no longer within the United States. In such case shall the United States Attorney defend the suit in the court of the foreign land? And shall the court of the foreign jurisdiction certify that there was probable cause for the act of the collector and thus bind the United States to pay?

It would seem clear that such a result was not contemplated by the statutes. It would seem clear that it was not intended that the United States attorneys should be compelled to go without the limits of the United States or that the courts of a foreign jurisdiction should be required to be invoked to enforce a taxpayer's rights against the United States under the Revenue Laws of the United States.

And yet if the position of the Government should be sustained we have this absurd result in the supposed case:

1. The courts of foreign jurisdiction passing upon the rights of a citizen of the United States and the liability of the United States with respect to its internal

revenue and fixing the liability of the United States in a case in which the United States Attorney appears and defends the Government, or, if this is not the law, as manifestly it is not, then

2. The former collector there sued is subject to a personal judgment for which he becomes personally liable and from which he has no relief, and

3. The court being without jurisdiction to issue the certificate of probable cause the taxpayer has no right of payment from the United States and may or may not succeed in satisfying his judgment from the property of the former collector.

In a case where the collector did not have property sufficient to satisfy the judgment on execution the taxpayer would be without remedy. In the case in which the collector had property sufficient to satisfy the judgment the collector would be without remedy. In both cases the United States would retain the amount of the tax to which it was not lawfully entitled.

It is manifest that the Revenue Statutes should be given a construction to accomplish their purpose. They should be construed so as to afford a remedy to the taxpayer and not so as to deny a remedy. They should be construed so as to afford protection to the collector who has acted in his official capacity and not so as to deny protection. They manifestly provide for a remedy against the collector in the official capacity and not against him as an individual. And so properly construed the collector in office at the time of the commencement of suit is the proper defendant.

As was stated in the case of *Philadelphia* v. *Collector*, 5 Wall 720-730:

> "Parties compelled to pay an illegal assessment ought to have a *convenient remedy* to redress the injury."

Internal revenue taxes are payable in the district of the residence of the taxpayer. A suit against the collector of that district furnishes the convenient remedy. It retains to the taxpayer the right of a trial by jury in a court convenient to his residence. This has been the practice throughout the years as shown in all of the cases adjudicated by this court. In all of the cases heretofore decided by this court the collector to whom taxes were paid was in office at the time suit was commenced against him.

To send the taxpayer to the Court of Claims at Washington, far from his residence it may be from the farthest point in this country, to find redress for the taxation wrong is not in consonance with the repeatedly declared purposes of the internal revenue statutes passed to provide a system of corrective justice wherein the taxpayer would have a convenient remedy. No more is it within the purpose of the statutes to require the aggrieved taxpayer to search the highways and byways for the person of a former collector.

Likewise giving to Sections 989 and 3220 of the Revised Statutes, a liberal and not a limited construction, a construction which will accomplish the purpose of their enactment, results in the word "Collector" being construed as referring to the official office and not the individual occupying it at the time the taxes are paid.

For the purpose of clearly showing the effect of such construction these sections are set out following. The words in italics show the effect of the construction. The words in parentheses are the pronouns of the statute as written, which pronouns, by a proper construction, may be considered as referring to the nouns italicized in the setting out of the statute as properly construed:

"Section 989—When a recovery is had in any suit

or proceeding against a collector or other officer of the Revenue for any act done by *a collector or other officer* (him), or for the recovery of any money exacted by or paid to *a collector or other officer* (him) and by *a collector or other officer* (him) paid into the Treasury in the performance of *a collector's or other officer's* (his) official duty, and the court certifies that there was probable cause for the act done by the collector or other officer or that the *collector or other officer* (he) acted under the direction of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

Section 3220—The Commissioner of Internal Revenue, subject to Regulations prescribed by the Secretary of the Treasury, is authorized * * * to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against *any collector or deputy collector* (him) in any court, for any internal taxes collected by *any collector or deputy collector* (him) with the costs and expenses of suit; also all damages and costs recovered against any assessor or assistant assessor, collector, deputy collector or inspector in any suit brought against *any assessor, assistant assessor, collector, deputy collector or inspector* (him) by reason of anything done in the due performance of *any assessor's, assistant assessor's, collector's, deputy collector's or inspector's* (his) official duty.

Section 771—It shall be the duty of every district attorney * * * unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by *collectors or other officers of the revenue* (them) or for the recovery of any money exacted by or paid to such *collectors or other officers of the revenue* (officers) and by *such collectors or other officers of the revenue* (them) paid into the Treasury."

2. THESE STATUTES SHOULD BE LIBERALLY INTERPRETED TO MAKE EFFECTIVE THE REMEDY THEREBY PROVIDED.

This case was commenced after Fitch had retired from office and Smietanka had been appointed his successor. As this action is in effect against the Government, the United States will be better protected if the suit is brought against its official representative. In most cases it is more convenient and more practical for both parties, the Government and the taxpayer, if the action is brought against the collector in office; otherwise it might be necessary to have an executor or administrator appointed for a deceased collector, or, if a collector has moved out of the district, or even out of the United States, to follow him to his new residence.

Judge Geiger considered very carefully the proper construction to be placed upon the sections of the statute in question, in *Northwestern Mutual Life Insurance Company* v. *Fink*, 248 Fed. 568, where the Government contended that the action was barred under Section 3225 R. S. because the plaintiff had inadvertently omitted an item from its report. In holding that these statutes should be given a broad interpretation, Judge Geiger said, page 577:

> "I shall assume that Section 3225 is brought into the tax law in question; and it necessitates consideration of that section as part of a chapter, dealing generally with practice, procedure, rights and remedies awarded to both Government and taxpayer or citizen, in the matter of assessment, collection, remission, and refund of public dues. These laws are not of recent enactment. The times and conditions at and under which they came into being to further the raising of revenue to meet a situation of great national stress, the administrative recognition and application accorded them for over 50 years, may safely aid in throwing light upon the just interpre-

tation to be given. Without narrating historically the advent and amendment of this particular Section 3225 and allied provisos, it suffices to say that they had their beginnings in the Civil War Revenue Act of June 30, 1864 (13 U. S. Stat., p. 223), as amended by the Act of July 13, 1866 (14 U S. Stat., 98). They exhibit the early recognition by the Government of the necessity of ways and means for revising, both in the interest of the Government and the taxpayer the returns or assesments made or levied, and for refunding or recovering of taxes actually paid; and from the earliest occasions when interpretations of these statutes was called for the courts here have uniformly given to the results accomplished by legislation on the general subject, this broad characterization:

'The revenue measures of every civilized Government constitute a system which provides for its enforcement by officers commissioned for that purpose. In this country, the system for each state, or for the Federal Government, provides safeguards of its own against mistake, injustice, or oppression in the administration of its revenue laws. Such appeals are allowed to specified tribunals as the lawmakers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise are provided. In these respects, the United States have as was said by the Court in *Nichols* v. *United States*, 7 Wall. 122 (19 L. Ed. 125), enacted a system of corrective justice, as well as a system of taxation in both its customs and internal revenue branches. That system is intended to be complete. * * * So also in the internal revenue department the statute allows appeals to the assessor to the Commissioner of Internal Revenue; and, if dissatisfied with his decision, on paying the tax the party can sue the collector; and if the money was wrongfully exacted, the courts will give him relief by a judgment, which the United States pledges herself to pay.' Per Miller, Justice, *Cheatham* v. *U. S.*, 92 U. S. 88, 23 L. Ed. 561.

A careful reading of adjudicated cases—indeed, all legislation upon the varied phases of public revenues—suggests that at no time has there been a

purpose to cut off or to impair, either as against the Government or the citizen, this '*system of corrective justice*' attending the administration of revenue laws."

3. THE ARGUMENTS ADVANCED IN THE OPINION IN ROBERTS V. LOWE, AND IN THE TWO OPINIONS IN PHILADELPHIA, ETC., V. LEDERER, ARE NOT WELL FOUNDED.

With all respect to these courts, we feel that they have *not given sufficient consideration to the history* and development of the remedial statutes in question; that they have looked at the form rather than the substance of the actions, and that they have placed upon the *statutes a narrow construction*, entirely out of keeping with their purpose.

We have outlined the grounds upon which these cases were decided. We shall consider these in the order in which they appear:

(a) It is said that an action cannot be maintained against a collector's successor in office because he would not be protected by Section 989 R. S., which provides for a certificate of the court that the collector acted under the directions of the Secretary of the Treasury. Since the decision in *Carey* v. *Curtis*, 3 How. 236, a personal judgment could not be obtained against a collector for money which he was presumed to pay immediately into the public treasury. Any judgment, whether rendered against the collector or his successor, would run against him only in his official capacity and would be payable out of the public treasury.

Since the passage *of the Act of* 1899, which provides that *no action* against the head of any department with relation to the discharge of his official duties *shall abate* by reason of his death or the expiration of his term of office or his retirement or resignation or removal from

office, but that it may be maintained against his successor, it is perfectly clear that the argument of the opinions cited is without foundation.

There is nothing in the Act of 1899 which gives any protection to the successor in office who is made a party defendant to the suit against his predecessor after the termination of the office of his predecessor. The Act of 1899 merely provides for making the successor in office a party defendant. The successor in office has his protection, if at all, only under Sections 989 or 3220.

If Section 989 is to be construed as giving protection to the collector against whom judgment is rendered only in the event he was the collector to whom the taxes were paid then Section 989 cannot upon any theory afford any protection to the succeeding collector against whom judgment is recovered for taxes paid to his predecessor notwithstanding such succeeding collector is made a party defendant pursuant to statute. Manifestly, Section 989 affords protection to the succeeding collector made a party defendant under the Act of 1899. Thus falls the argument that Section 989 does not give protection except in a case of a judgment rendered against a collector to whom the tax was paid.

The Act of 1899 becomes a part of the remedial system and construed with reference to this act the remedial system contemplates a suit in which a judgment is rendered not against the collector personally for taxes collected by him and which he has paid into the public treasury, but against the collector as the agent of the Government for taxes collected by his predecessor and paid by his predecessor into the public treasury. All of the cases decided after the passage of the act requiring the collector to pay over moneys immediately to the Treasurer hold that the collector then becomes merely the messen-

ger of the Treasurer and that there was no longer any liability on his part. Under the act he is merely the nominal defendant.

Likewise, under Section 3220 R. S., the Commissioner is required to pay to any collector the full amount of judgments recovered against him including costs and expenses of suit and no certificate of the court is necessary to support such repayment. *U. S.* v. *Frerichs*, 124 U. S. 315.

Sections 989 and 3220 as properly construed furnish protection to the collector against whom judgment is rendered whether such collector is one to whom the tax was paid or his successor in office and whether the successor in office against whom judgment is rendered is made such as the original defendant as in the case at bar or is made defendant under the Act of 1899. Otherwise there is no protection to any successor in office against whom a judgment is entered.

In the wording of Sections 989 and 3220 there is no basis for including within the protection of Sections 989 and 3220 one successor collector and excluding from the protection of the sections another successor collector. Either both are or neither is within the protection of the statute.

(b) The decision of the Supreme Court in *Patten* v. *Brady*, 184 U. S. 608, is said to be inconsistent with an action against the collector's successor. In that case the trial court dismissed the suit of the taxpayer against the collector in office to whom the taxes had been paid. The taxpayer sued out a writ of error in the Supreme Court. While the case was there pending the defendant collector died. In the Supreme Court an application was made to substitute the personal representative of the collector. The question before the court in that case was whether or not the *cause of action survived*. The whole argument

was upon this question, and no consideration was given to the person in whose name it should be revived. The Government insisted that it was an action based upon tort and abated by reason of the death of the defendant. None of the authorities which we have cited were apparently brought to the attention of the court except *Philadelphia* v. *Collector*, 5 Wall. 720, and that only for the purpose of showing that the action was one in implied assumpsit. The fact that the action is now statutory and in effect against the United States, was apparently not considered. It was immaterial to that case whether the action was revived in the name of the executrix or in the name of the collector's successor. Neither does it appear that the Act of 1899, providing for the substitution of the collector's successor, was brought to the attention of the court. It is impossible to tell from a reading of the opinion, what the court would have decided if the collector's successor had been substituted upon the former's death.

(c) It is argued that *the Act of* 1899, providing for the substitution of the collector's successor, *does not apply* because no action was commenced against his predecessor. The other remedial sections, viewed in the light of the Act of 1899, clearly provide for an action against the Government's representative and not against that representative personally. The Act of 1899 applies only insofar as it indicates the construction to be placed upon the other acts.

(d) Judge Thompson (239 Fed. 186) says that the cause of *action is upon an implied assumpsit,* and that except for statutory provisions the *collector is personally* liable and execution can be had against his property. *Carey* v. *Curtis, supra,* held the contrary. The action is statutory and the collector is not personally liable.

(e) Upon page 186 Judge Thompson apparently holds that the suit must be against the collector who received

the money, for the reason that *District Attorneys are authorized under Section* 771 *R. S. to defend only suits* brought against collectors for moneys paid to them personally. This is a very narrow construction of the section in question, and the fact that the *District Attorney defended this case* would tend to refute any such construction.

(f) It is said that there is *no principle of the common law* upon which the action may be based. That is correct; it is *purely a statutory right of action.*

(g) In the *Lederer case*, the Circuit Court of Appeals, while conceding that in practical effect suits of this character are against the collector in his official capacity, state that the statutes *must be strictly obeyed* and that they do not permit a suit against a collector's successor. We contend, on the other hand, that the statute should be given a liberal construction to permit the recovery of taxes which have been illegally assessed; that the statutes as construed by the Supreme Court contemplate an action against the collector as the Government's agent, and that any judgment obtained against him will be paid out of the public treasury.

(h) At page 494, this court says that the basis of the action against the collector is *his receipt of the tax.* That was the basis *prior to the decision* in *Carey* v. *Curtis;* since then, the basis of the suit has been the statutory provisions for refunding on the part of the Government.

From a careful examination of these three opinions, it is apparent that the courts did not consider the statutes in the light of their history and construction by the Supreme Court of the United States. If they had, they would not have given the *statutes a narrow construction;* they would not have held that a suit against the collector's successor would render such successor liable to a personal judgment, but they must have concluded that the collector, whether the original collector or his successor, was merely the nominal defendant.

POSITION OF THE GOVERNMENT CONSIDERED.

The following consideration of the position of the Government is on the assumption that it will present in the Supreme Court the same position which it took in the Circuit Court of Appeals. This assumption is indulged as a copy of a brief in the Supreme Court on behalf of the Government has not been received by the attorney for Indiana Steel Company.

I.

AS TO THE ISSUES OF WHETHER THE PLAINTIFF HAS SUED THE PROPER PARTY DEFENDANT.

It is contended by the Government that the collector at the time of the commencement of the suit was not the proper party defendant for the following reasons:

1. Such collector is not liable for money had and received by his predecessor in office in that
   (a) There is no statute which authorizes suit against a collector in his official capacity.
   (b) The United States cannot be sued without its consent.
   (c) Therefore the action is a personal action against the collector in his personal and not his official capacity.

All of these questions have heretofore been considered. This history of the legislation and of the decisions clearly demonstrate that originally there was a personal action against the collector on the old common law theory of money had and received. (*Elliott* v. *Swartwout*, 10 Peters 137) but that when Congress passed the statute requiring the collector to pay into the treasury of the United States all moneys collected by him such action ceased to exist. (*Carey* v. *Curtis*, 3 How. 236.)

A like rule was held to apply in the matter of internal revenue taxes in the case of *Philadelphia* v. *Collector*, 5 Wall. 720, and in *Hubbard* v. *Collector*, 12 Wall. 1, 12, 13, where it was held that there was no personal liability of the collector on the old common law action of money had and received which was not the fundamental theory of the right to recover but that the present right of action arose by implication from the several acts of Congress and was grounded upon the acts of Congress. Thus in the latter cases it is clearly pointed out that the statutes have given the permission to sue the Government thorugh its collector (*Cheatham* v. *U. S.*, 92 U. S. 85-88) and that the Government has by statute prescribed the conditions on which it would subject itself to the judgments of the courts in the matters pertaining to the collection of its revenues.

Anson v. *Murphy*, 115 U. S. 579-585.
Savings Institution v. *Blair*, 116 U. S. 200.

As the decisions clearly show that the United States has consented by implication that it be sued through its collector and that the collector is not liable personally with respect to taxes collected and paid into the treasury, the conclusion necessarily results that the fundamental theory of the action is against a collector in his official capacity who is the representative of the Government for such purposes, from which it follows that the collector in office at the time suit is instituted is the proper defendant with respect to taxes collected through such office.

II.

THE UNITED STATES DOES NOT BECOME A PARTY UNLESS A CERTIFICATE OF PROBABLE CAUSE IS ISSUED IN ACCORDANCE WITH SECTION 989 OF THE REVISED STATUTES.

In determining the question of whether suit may be properly brought against the collector in office it is quite

immaterial when upon the record the United States becomes a party or its liability to pay a judgment arises. It is clear that the United States is not technically and in fact a party at any time but the United States has by statute authorized suits against its official representative—its collector—and has provided that when judgment is recovered and in the opinion of the court the probable cause existed for the act of collection of the tax and the court so certifies then the United States will pay the judgment recovered. The requirement as to the certificate is for the protection of the United States in that the right of recovery sought against the collector may be based upon some act in his own wrong and not in the discharge of his official duties. Hence, the provision for the certificate of probable cause to the end that the court which has heard the case may determine whether the judgment is one which should be a personal judgment with execution against the individual or a judgment which will not be enforced by execution but by authorized payments out of the treasury of the United States.

Thus it follows that the time at which the liability of the United States attaches is quite immaterial in determining whether the suit may not properly be brought against the official representative of the Government—the collector in office, at the time of the commencement of the suit. It, of course, must be correct that if the suit is one to recover for an act of a collector in his own wrong as distinguished from his act in the collection of taxes paid by him into the treasury of the United States then the successor in office would not be liable for the personal wrong of his predecessor.

With the exception of the cases of *Roberts* v. *Lowe*, 236 Fed. 604-605, *Philadelphia, etc., R. Co.* v. *Lederer*, 242 Fed. 492, *Philadelphia, etc., R. Co.* v. *Lederer*, 239 Fed. 184, which cases have heretofore been considered in this brief, the cases relied on by the Government are not in point.

U. S. v. *Sherman*, 98 U. S. 565, decided that liability of the Government to pay did not arise until the certificate of probable cause had issued and therefore mandamus would not lie to compel the payment of interest upon the judgment during the time intervening between the rendition of the judgment and the court certification of probable cause.

In the case of *Sage* v. *U. S.*, 250 U. S. 33, plaintiff had recovered agianst a collector for a part of the taxes claimed to have been illegally exacted, judgment for which was paid by the Government. Subsequently a statute was passed authorizing the recovery on claims of the kind which were denied to plaintiff in the suit which he had commenced and in which he had recovered judgment for part of that for which he was contending. Pursuant to the subsequent statutory authority plaintiff brought suit directly against the United States in which case the Government contended that the former judgment against the collector was a bar to the suit against the United States. The Supreme Court in discussing the doctrine of *res adjudicata* stated in an opinion by Justice Holmes "no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the court of claims." The court was merely discussing the technical requirements necessary in a bar by former adjudication and considered that the requirements of such a bar were not found in the situation although the case was decided upon the effect of a statute as appears from the opinion on page 38, where it is said:

> "But perhaps it would be enough to say that if the judgment otherwise were a bar the bar would be removed by the subsequent enactment of the act of July 27, 1912, upon which, as well as the act of 1902, this claim is based."

It is admitted that a recovery once had from a collector would bar any attempted subsequent recovery from the United States.

The judgment liability of the United States is not dependant on official discretion or grace, but is fixed by the court's certificate of probable cause under Section 989 R. S.

U. S. v. *Sherman*, 98 U. S. 565, 567.

III.

THE ACTION IS PROPERLY AN ACTION FOR MONEY HAD AND RECEIVED AGAINST THE COLLECTOR IN HIS PERSONAL CAPACITY.

Having considered this contention of the Government under a former heading only the cases relied on the Government will now be referred to.

Philadelphia v. *the Collector*, 5 Wall. 720, which refers to the action as one for money had and received, is followed by the case of *Hubbard* v. *Collector*, 12 Wall. 1, 12, 13, where the court in an elaborate discussion of the right of recovery refers to the action of assumpsit as being an appropriate remedy but no longer imposing a personal liability on the part of the collector sued.

The language of the decisions in these cases demonstrates that the action is not a personal one against the collector and does not arise out of the common law action of money had and received, to-wit: that the defendant having improperly taken the money of the plaintiff held it for the use of the plaintiff and was bound to pay it over to him.

Thus in the *Philadelphia case*, page 733, it is said:

> "The clear implication of the several provisions of the statutes is that a judgment against the col-

> lector in such a cause is in the nature of a recovery against the United States and that the amount recovered is regarded as a proper charge against the revenue collected from that source."

In the *Hubbard case*, on page 13, referring to the *Philadelphia case*, the court said:

> "It is a great mistake to suppose that the right to maintain the action as there conceded was found in the theory that the collector held the money in his hands belonging to the plaintiff which he was bound to refund as the decision was placed expressly upon the ground that the several provisions in the Internal Revenue Acts before referred to warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy."

And at page 12 of the opinion in the *Hubbard case* it clearly appears that the right of action did not rest upon any theory of implied promise to repay for money had and received by the collector, but rested upon the clear right of the taxpayer to his remedy by suit against a collector as the official representative of the United States for such suit.

These cases would seem to be conclusive against the contention of the government that the action is a personal one against the collector and not in his official capacity. It is interesting to note that the case relied on by the Government—*Elliott* v. *Swartwout*, 35 U. S. 137, in which the discussion of the early theory lends support to the position that the action is purely personal was decided before the passage of a statute requiring the collector to promptly pay over all moneys into the treasury, after the passage of which statute, as is clearly shown in the case of *Carey* v. *Curtis*, 3 How. 236, the personal liability of the collector ceased.

In *Patten* v. *Brady, supra*, the only question considered was whether the nature of the action was such that

the action abated upon the death of the collector against whom suit had been brought, or whether the action might be revived in the name of the executor of the collector under Section 955 R. S., which gave such right in case the cause of action survived by law. The only question considered was whether the nature of the action was in tort and hence died with the person, or whether of that class which survived.

IV.

NO CERTIFICATE OF PROBABLE CAUSE WOULD ISSUE NOR WOULD ANY MONEY BE PAID OUT OF THE TREASURY OF THE UNITED STATES AS A RESULT OF THE JUDGMENT ENTERED AGAINST THE SUCCESSOR COLLECTOR FOR TAXES COLLECTED BY HIS PREDECESSOR IN OFFICE.

Section 3220 R. S. authorizes the Commissioner of Internal Revenue to repay to a collector the amount of money recovered against him for taxes collected by him in any suit brought by reason of anything done in the due performance of his official duty, and Section 989 R. S. provides for the payment out of the treasury of the United States of any final judgment upon the issuance by the court of a certificate of probable cause that the act was done by the collector in the performance of his official duty which statutes the government contends are limited in application to the specific collector who collected the taxes and do not apply to a collector who succeeds in office to the collector collecting the taxes.

As has been shown above, the statutes established a complete system of taxation and of corrective justice for the purpose, on the one hand, of obtaining prompt and ready collection of taxes due the United States, and on the other hand, of furnishing to the taxpayer a ready and convenient remedy for the recovery of such taxes when

they had been erroneously or illegally assessed and paid by him.

As has been shown, the statutes should be given a liberal interpretation in order to accomplish the purpose of their enactment—the protection of the government and the protection of the taxpayer.

To show the results of the construction which the government would place upon these statutes is to demonstrate their inadequacy to accomplish the purpose of their enactment if so construed and thus to likewise demonstrate the fallacy of such construction.

Let us assume what would readily occur to the mind of Congress in enacting such legislation, the probable situations to correct which a convenient remedy should be given.

1. Collector to whom payment of tax is made is the collector at the time of suit.

2. Collector to whom payment of tax is made is the one against whom suit is brought but he dies during the pendency of such suit.

3. Collector to whom payment of tax is made dies before Commissioner of Internal Revenue has passed upon the claim and before suit could be brought.

4. Collector to whom payment of tax is made resigns from office and leaves the jurisdiction of the United States before claim is decided by the Commissioner of Internal Revenue and therefore before suit could be brought against him.

The effect of the construction for which the government contends would result in only the first case being within the protection of such statutes. Thus only the case in which the suit was brought against and judgment recovered against the person of the individual who

as a collector received the tax would the taxpayer in the theory of the government in this case have any certain right of recovery. Does such a construction produce the result of a corrective system of justice? *Does* it accord to the taxpayer that convenient and certain remedy for the taxation wrong sustained which the decisions say it was the purpose of the statutes to provide?

If the construction of the government is correct, by what right in the event the collector dies can the Commissioner of Internal Revenue refund to the executor? The judgment in such a case would not be against the collector in person but against the personal representative of the collector to be paid out of the estate in due course of administration.

By the Act of February 8, 1899 (30 Stat. 822, U. S. Comp. Stats., 1916, Sec. 1594) it is provided:

> "That no suit, action or other proceeding lawfully commenced against the head of any department or bureau or *other officer of the United States in his official capacity or in relation to the discharge of his official duties shall abate by reason of his death or the expiration of his term of office or his retirement from office or resignation or removal from office,* but in such event the court on motion or supplemental petition filed at any time within twelve months thereafter showing the existing necessity of the survival thereof to obtain a settlement of the questions involved may allow the same to be maintained by or against his successor in office and the court may make such order as shall be equitable for the payment of costs."

This statute was enacted manifestly for the purpose of providing that where suit had been brought it should not be abated in the circumstances described but should be continued against the successor. The manifest purpose of this statute is to prevent what otherwise might

be a failure of justice in the case where on fundamental principles of abatement of actions the right might be lost but for the right of continuance of the action against the successor in office. Thus it might well be that before the death of the defendant sued in his official capacity the statute of limitations had run. The statute authorizes the suit to continue against the successor in office.

Is there not just as much reason, having regard to the fundamental purposes of the system of taxation and the remedies provided, that suit should be brought in the first instance against the collector in office who represents the government in this respect as did his predecessor to whom the taxes were paid as the reasons which impelled the enactment of the legislation authorizing a suit which had originally been brought against the predecessor being continued against the successor upon the termination of the predecessor's official connection with the government. The reason for the statute being limited to actions brought was solely because of the law of the abatement of actions.

If the construction of the Government is correct, by what right, in the event a suit is commenced against the original collector and continued against the successor collector, can the Commissioner of Internal Revenue pay the judgment against the successor collector?

By virtue of his office and the statute the successor collector becomes the judgment debtor, but on the construction of the Government he has no protection against the judgment and is personally liable therefor! Thus, if the collector is personally responsible, the taxpayer collects his judgment but if not personally responsible the taxpayer is without remedy in fact! In either case the Government retains the tax to which it is not entitled!

A construction of the remedial statutes which produces

a result so at variance with their purpose and with any proper conception of right and justice should not be sustained.

Giving to Sections 989 and 3220 of the revised statutes a liberal and not a limited construction, a construction which will accomplish the purposes of their enactment results in the word "collector" being construed as referring to the individual office and not the individual occupying it at the time the taxes are paid.

CONCLUSION.

As the *United States is the real defendant* in this case, a mere technicality is involved in determining whether the suit was properly commenced against Smietanka as the successor of Fitch.

This suit was properly brought against Smietanka. *Fitch was out of office* and no longer represented the Government. There was no personal liability upon his part, and under the decision in *Carey* v. *Curtis, no judgment* could be obtained *against him*. The *"system of corrective justice,"* provided by the statutes, contemplates a recovery against the United States. The suit, defended for the Government by the District Attorney, is for the purpose of *testing the tax liability of the company to the Government*. Neither Fitch nor Smietanka is interested in its outcome.

The *Government merely holds out the collector as its agent*, as a nominal defendant against whom suit may be brought. Only by a most artificial construction of the statutes can it be said that a suit of this character must be brought against the collector who received the payment of the tax.

The Government has received taxes to which it is not lawfully entitled in equity and good conscience. This money of the taxpayer should not be retained.

Under the wording of the statute, under every rule of statutory construction, under every tenable theory of the nature of the action the suit was properly brought.

From every consideration of the purpose of the statutes and their manifest policy of furnishing protection to the Government, to its collectors and to the taxpayers the suit was properly brought in the District Court against the collector in office.

An affirmative answer should be given to the questions certified.

Respectfully submitted,

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1921.

SMIETANKA, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, *v.* INDIANA STEEL COMPANY.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 214. Argued October 14, 1921.—Decided October 24, 1921.

1. An action against a collector of internal revenue to recover taxes erroneously exacted by him, is based upon his personal liability and cannot be maintained against his successor in office who had no part in the assessment, collection or disbursement of the taxes. P. 4. *Sage* v. *United States*, 250 U. S. 33.
2. The statutory provisions for defence by the district attorney and for withholding execution against the collector and paying the judgment from the Treasury where the judgment contains a certificate of probable cause, etc., (Rev. Stats., §§ 771, 989) do not create a new statutory liability attached to the office and passing to successors. P. 4.
3. The Act of February 8, 1899, c. 121, 30 Stat. 822, providing that a suit against an officer of the United States in his official capacity shall not abate by reason of his death or the expiration of his term of office but may be allowed to be maintained against his successor, supposes a suit already begun against the officer in his lifetime. P. 5.

CERTIFICATE from the Circuit Court of Appeals propounding questions arising upon the review of a judg-

ment against Smietanka in an action to recover taxes exacted by his predecessor as Collector of Internal Revenue.

Mr. Assistant Attorney General Ottinger, with whom *Mr. Solicitor General Beck* was on the brief, for Smietanka.

Mr. William Beye, with whom *Mr. K. K. Knapp* and *Mr. R. W. Campbell* were on the brief, for Indiana Steel Company.

The action was properly brought against the collector who was in office at the time of the commencement of the suit. The United States has "enacted a system of corrective justice" by which the taxpayer is permitted "to sue the Government through its collector," and if the tax "was wrongfully exacted the courts will give him relief by a judgment which the United States pledges herself to pay." *Cheatham* v. *United States*, 92 U. S. 85, 88; *Philadelphia* v. *Collector*, 5 Wall. 720, 733.

The statute requiring the collector to pay the moneys collected by him into the Treasury took away the common-law action theretofore existing, and provided only a purely statutory remedy, which, while not in form, is in substance against the United States. *Hubbard* v. *Collector*, 12 Wall. 1, 11, 13; *Cary* v. *Curtis*, 3 How. 236; *Philadelphia* v. *Collector*, 5 Wall. 720, 732; *Schoenfeld* v. *Hendricks*, 152 U. S. 691; *Kinney* v. *Connat*, 166 Fed. 720; *United States* v. *Frerichs*, 124 U. S. 315; *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 205; *Arnson* v. *Murphy*, 115 U. S. 579.

The proper defendant is the collector in office at the time suit is commenced. *Armour* v. *Roberts*, 151 Fed. 846.

The pertinent statutes are, §§ 3220, 3219, 3224, 3226, 3227, 3228, 3210, 771, 3689, 989, Rev. Stats., and Act of February 8, 1899, c. 121, 30 Stat. 822. These remedial statutes should be liberally construed to accomplish the purpose of their enactment.

In cases of this kind, the collector is merely the nominal defendant, and it would seem immaterial whether the suit was brought against the collector who collected the money or his successor in office, so long as the Government has an opportunity to defend. The question before the court is whether the United States has received moneys which properly belong to the plaintiff.

The arguments advanced in the opinions in *Roberts* v. *Lowe*, 236 Fed. 604; *Philadelphia, H. & P. R. R. Co.* v. *Lederer*, 242 Fed. 492; 239 Fed. 184, are not well founded.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought to recover internal revenue special excise taxes for the years 1910 and 1912, assessed under the Act of Congress of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112; and paid by the plaintiff, the defendant in error, under duress. The taxes were collected by S. M. Fitch, then collector of internal revenue, and it was certified by the District Court as part of its judgment that there was probable cause for the act of the collector, that he acted under the direction of the Commissioner of Internal Revenue, and that the amounts recovered should be provided for and paid out of the proper appropriation from the Treasury of the United States. The defendant is the present collector for what was Fitch's district and was held liable by this judgment. The case was taken to the Circuit Court of Appeals which has certified the following questions:

"1. Assuming that the declaration states a good cause of action had the suit been brought against S. M. Fitch, the internal revenue collector who actually collected and received the taxes, does it state any cause of action whatever against said S. M. Fitch's successor in office, the plaintiff in error, against whom the suit was brought, but who had no participation in the collection, receipt or disbursement of such taxes?

"2. May suit in the District Court of the United States properly be brought and maintained against a United States collector of internal revenue for the recovery of the amount of a United States internal revenue tax, unlawfully assessed and collected, but in the collection and disbursement of which such collector had no agency, the entire transaction of such assessment, collection and disbursement having occurred during the incumbency of such office of a predecessor in office of such collector?"

As the law stood before later statutes a collector was liable personally for duties mistakenly collected, if the person charged gave notice, at the time, of his intention to sue, and warning not to pay over the amount to the Treasury. *Elliott* v. *Swartwout*, 10 Pet. 137. But, after an act of Congress had required collectors to pay over such monies, it was held, against the dissent of Mr. Justice Story, that the personal liability was gone. *Cary* v. *Curtis*, 3 How. 236. Later statutes however recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to successors, as was held in this case, the formal defendant being saved from harm by the United States. This however is not the language of the statutes and hardly can be reconciled with the decision of this Court in *Sage* v. *United States*, 250 U. S. 33, and other cases to which we shall refer.

To show that the action still is personal, as laid down in *Sage* v. *United States*, 250 U. S. 33, 37, it would seem to be enough to observe that when the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the Court in the case. It is not to be supposed that a stranger to an unwarranted transaction is made answerable for it; yet that might be the result of the suit if it could be brought against a successor to the collector-

ship. A personal execution is denied only when the certificate is given. It is true that in this instance the certificate has been made, but the intended scope of the action must be judged by its possibilities under the statutes that deal with it. The language of the most material enactment, Rev. Stats., § 989, gives no countenance to the plaintiff's argument. It enacts that no execution shall issue against the collector but that the amount of the judgment shall "be provided for and paid out of the proper appropriation from the Treasury," when and only when the Court certifies to either of the facts certified here, and "when a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty." A recovery for acts done by the defendant is the only one contemplated by the words "by him." The same is true of Rev. Stats., § 771, requiring District Attorneys to defend such suits.

No different conclusion results from the Act of February 8, 1899, c. 121, 30 Stat. 822. That is a general provision that a suit by or against an "officer of the United States in his official capacity" should not abate by reason of his death, or the expiration of his term of office, &c., but that the Court upon motion within twelve months showing the necessity for the survival of the suit to obtain a settlement of the question involved, may allow the same to be maintained by or against his successor in office. Whether this would apply to a suit of the present kind is at least doubtful. *Roberts* v. *Lowe*, 236 Fed. 604, 605. In *Patton* v. *Brady*, 184 U. S. 608, a suit against a collector begun after the passage of this statute, it was held that it could be revived against his executrix, which shows again that the action is personal; as also does the fact that the collector may be held liable for interest. *Erskine* v. *Van*

Arsdale, 15 Wall. 75. *Redfield* v. *Bartels*, 139 U. S. 694. But in any event the statute supposes a suit already begun against the officer in his lifetime. We need not consider the remedies against the United States. *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28; *Sage* v. *United States*, 250 U. S. 33. It appears to us plain without further discussion that both questions must be answered: No.

Answers to Questions 1 and 2: No.

MR. JUSTICE MCKENNA and MR. JUSTICE CLARKE dissent.